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Supreme Court, U.S.
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No. 97-1746 APR 27 1998

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

KEVIN IRBY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois,
First Judicial District

PETITION FOR WRIT OF CERTIORARI

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(1a) QUESTIONS PRESENTED

1. Is due process violated by the admission into evidence, in a State criminal trial, of highly prejudicial evidence which is irrelevant? More precisely:

A. Was defendant convicted of possession of firearm by felon in violation of his right to a fair trial as guaranteed by 14th Amendment due process of law, where the jury was permitted to hear the name of the prior felony [involving a weapon], though defendant offered to stipulate that he had been convicted of **a** felony, and the offense element that the State had to prove was **any** felony?

B. Is it so irrational to permit a jury in a State criminal trial to hear highly prejudicial evidence which is absolutely irrelevant, that it violates due process of law within the meaning of such decisions as Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979), and Leary v. United States, 395 U.S. 6, 23 L.Ed.2d 57 (1969)?

C. Is the holding of Old Chief v. United States, 519 U.S. ___, 136 L.Ed.2d 574 (1997) - barring the use of highly prejudicial evidence that is wholly irrelevant due to a defense offer to stipulate - so essential to a fair trial that 14th Amendment due process requires the States to apply it?

1(b) PARTIES INVOLVED

Petitioner, Kevin Irby, was the Defendant in the Circuit Court of Cook County, Illinois, Appellant in the Appellate Court of Illinois, First Judicial District, and petitioner in the Supreme Court of Illinois.

Respondent, People of the State of Illinois, was the Plaintiff in the Circuit Court of Cook County, Illinois, Appellee in the Appellate Court of Illinois, First Judicial District, and Respondent in the Supreme Court of Illinois.

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IN THE
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OCTOBER TERM, 1997

KEVIN IRBY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois,
First Judicial District

PETITION FOR WRIT OF CERTIORARI

Petitioner, KEVIN IRBY ("Defendant"), prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, 1st Judicial District.

Judgment and Opinion Below

The unpublished Order of the Appellate Court of Illinois, 1st

Judicial District, modified upon rehearing, September 17, 1997, is set out as App. B.

Jurisdictional Statement

On July 30, 1997, the Appellate Court of Illinois, 1st Judicial District, filed its Opinion (App. A) affirming the District Court's judgment. Petition for rehearing, timely filed, resulted in that Court filing a Modified [Order] Upon Rehearing, September 17, 1997 (App. B). Defendant's timely-filed Petition for Leave to Appeal to the Supreme Court of Illinois, No. 84302, was denied on February 4, 1998 (App. C). This Petition is timely filed within 90 days thereafter. Jurisdiction is invoked under 28 U.S.C. § 1257(a) and Rules 10, 12 & 13.1 of this Court.

Constitutional Provision

The 14th Amendment to the U.S. Constitution provides, in pertinent part:

> "Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Defendant, charged with unlawful use of a firearm by a felon in violation of an Illinois law [720 ILCS 5/24-1.1(a) (West 1994)] that makes it a felony for a person to knowingly possess any firearm if the person has been convicted of a felony under the laws of Illinois or of any other jurisdiction, offered to stipulate to the fact of his prior felony, and moved *in limine* to prevent the prosecution from presenting to the jury, the fact that the prior felony was

for unlawful use of a weapon. The Circuit Court denied the motion *in limine* and allowed the prosecution to present to the jury, the nature of defendant's prior felony. Defendant was convicted and sentenced to two years.

On appeal, the Appellate Court of Illinois, 1st Judicial District, affirmed in an unpublished Order on July 30, 1997 (App. A), and in a Modified [Order] Upon Rehearing on September 17, 1997, again affirmed (App. B)

RAISING THE FEDERAL QUESTION BELOW

Even before Old Chief was decided, defendant raised the matter as a due process/fair trial issue in federal constitutional terms.

In the Circuit Court of Cook County, Illinois, defendant sought to

exclude reference to the nature of his prior felony conviction, and offered to stipulate that he had a prior felony conviction. He moved *in limine* to preclude the prosecution from advising the jury of the nature of his prior felony conviction, and argued in the Circuit Court that he would be denied a fair trial, in violation of due process of law, by the court permitting the prosecution to advise the jury that the prior felony of which defendant had been convicted was the same as the felony he was now charged with, unlawful use of weapon. He argued that the constitutional imperative of due process and the requirement of a fair trial for this defendant in his trial for Unlawful Possession of Firearm in Abode by

Previously Convicted Felon in this case, require that upon defendant's objection to the evidence that his prior felony conviction was for UUW, and upon his offer to stipulate to the essential-element fact that he had a prior felony conviction, the court should exclude from the jury on defense motion, evidence of and reference to the fact that defendant's prior felony conviction was for unlawful use of weapon. (Tr. E-12-16 [court's ruling]; stipulation re prior felony conviction, Tr. F-89-90; argument of prosecution, Tr. F-128; court's instructions, Tr. F-167, F-168) He also raised this issue in his Motion for New Trial in the Circuit Court.

On appeal, Point 1 of defendant's Brief in the Appellate Court of

Illinois, 1st Judicial District, was captioned:

> **Defendant was denied a fair trial, in violation of due process of law, when the court permitted the prosecution to advise the jury that the prior felony of which defendant had been convicted was the same as the felony he is now charged with, unlawful use of weapon.**
>
> **Permitting the prosecution to so advise the jury - where (A) all the prosecution had to prove was that defendant had a prior felony conviction, (B) the nature of that prior felony was irrelevant to the present charge, and (C) defendant was willing to stipulate that he had a prior felony conviction - violated due process and deprived defendant of his constitutional right to a fair trial as guaranteed by the 14th Amendment to the U.S. Constitution and Art. I, § 2 of the Illinois Constitution of 1970.** (Def. Br. pp. 1, 9)

Point 1 was in Def. Br. pp. 9-18.

Old Chief was decided January 7, 1997, after defendant's opening Brief was filed in the Appellate Court.

Defendant cited and relied on this decision in his Reply Brief (p. 1) in the Appellate Court of Illinois, and in his Petition for Rehearing from the affirming Order of July 30, 1997 (App. A), which failed to mention Old Chief. In its Modified Order Upon Rehearing of September 17, 1997, the Appellate Court acknowledged our reliance on Old Chief, and again rejected our position that due process as guaranteed by the 14th Amendment to the U.S. Constitution required that the prejudicial nature of the prior felony be excluded where defendant is willing to stipulate to the essential-element fact of a prior felony. (App. B)

The federal constitutional issue (based on Old Chief) was raised in

defendant's Petition for Leave to Appeal to the Supreme Court of Illinois, which denied the Petition. (App. C)

Statement of Facts

On May 29, 1994, at approximately 5:40 a.m., the defendant's fiancee committed suicide. (Tr. A-4) Defendant called the fire department. (Tr. A-4) Paramedics arrived within five minutes. (Tr. A-5) Within several minutes of that, his fiancee was moved from the house. (Tr. A-5)

During a police search of the location without a warrant, and pursuant to non-Mirandized statements defendant made to police as to the location of a gun that he said he owned (Tr. F-35-36; F-48; F-67-68), a gun was discovered by police that was used by the suicide.

(Tr. F-36) That gun is the gun as to which defendant was convicted of possession by previously convicted felon in his abode, as charged in Count 3 [as amended] - the only remaining count of the Information. (See Tr. E-17.)

The undisputed evidence is that defendant's girlfriend/fiancee shot herself. Undisputed defense evidence is that she had that gun in her possession earlier in the day. (Tr. F-101-103) The sole evidence of defendant's possession - an essential element of the offense of which he stands convicted - is through his own alleged admissions (Tr. F-35-36; F-48; F-67-68), which are vague and unspecific as to <u>when</u> the defendant may have had contact with the gun.

In this case, at least some of the jurors had cause to pause. During deliberations, they requested the court's advice concerning certain evidentiary matters. (Tr. F-174-75) The judge advised that he could not answer those questions - with no objection from either side. (Tr. F-176)

REASONS FOR GRANTING CERTIORARI

1. Due process is violated by the admission into evidence, in a State criminal trial, of highly prejudicial evidence which is irrelevant. More precisely:

> **A. Defendant was convicted of possession of firearm by felon in violation of his right to a fair trial as guaranteed by 14th Amendment due process of law, where the jury was permitted to hear the name of the prior felony [involving a weapon], though defendant offered to stipulate that he had been convicted of a felony, and the offense element that the State had to prove was any felony.**

B. It is so irrational to permit a jury in a State criminal trial to hear highly prejudicial evidence which is absolutely irrelevant, that it violates due process of law within the meaning of such decisions as Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979), and Leary v. United States, 395 U.S. 6, 23 L.Ed.2d 57 (1969).

C. The holding of Old Chief v. United States, 519 U.S. ___, 136 L.Ed.2d 574 (1997) - barring the use of highly prejudicial evidence that is wholly irrelevant due to a defense offer to stipulate - is so essential to a fair trial that 14th Amendment due process requires the States to apply it.

Raised by the issue here, is the issue left unresolved by Estelle v. McGuire, 502 U.S. 62, 116 L.Ed.2d 385 (1991), i.e., whether introduction of prejudicial **irrelevant** evidence violates due process. Id. at 70, 116 L.Ed.2d at 397.

In Spencer v. Texas, 385 U.S. 554, 17 L.Ed.2d 606 (1967), this Court upheld

the statutory scheme - although acknowledging that it permitted the jury to hear very prejudicial evidence, id. at 560-62, 17 L.Ed.2d at 612 - because it recognized that **relevant** evidence has a right to be admitted. However, as recognized in Old Chief v. United States, 519 U.S. ___, 136 L.Ed.2d 574 (1997), where the offense of which the prosecution had to convict defendant, was possession of weapon by a prior felon, what the prior felony was, was irrelevant. Hence, as there stated:

> "In this case, as in any other in which the prior conviction is for an offense likely to support conviction on some improper ground, the only reasonable conclusion was that the risk of unfair prejudice did substantially outweigh the discounted probative value of the record of conviction, and it was an abuse of discretion to admit the record when an admission [stipulation] was

available." 136 L.Ed.2d at 594-95.[1]

Thus, this Court has held that under the Federal Rules of Evidence, specifically, Rules 401, 403 & 404, which require relevance and the balancing of prejudicial impact against probative value [a/k/a relevance], the specific nature of the prior felony should not be stated, where the defendant's offer to stipulate covers the prosecution's burden of proving a

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[1] Accord, cf. United States v. Crowder, 87 F.3d 1405 (D.C. Cir. 1996) (en bank) (defense concession [stipulation] of element of crime to which "prior bad acts" evidence relates, renders such evidence irrelevant, and thus inadmissible; where defendants unequivocally willing to concede that a person who possessed drugs under circumstances alleged by prosecution would have had intent to distribute, "bad acts" evidence offered solely to prove conceded element, is inadmissible).

prior felony conviction as an element of the present offense on trial.

This Court should impose its reasoning in Old Chief, supra, on the States, to preserve defendants' right to constitutionally fair trials in accordance with 14th Amendment due process of law.

This result is mandated by the "rationality" component of due process. This Court has held that due process is violated when evidence is admitted in order to prove a proposition, and - rationally - that evidence cannot prove that proposition. Leary v. United States, 395 U.S. 6, 23 L.Ed.2d 57 (1969); United States v. Ross, 92 U.S. (23 Wall.) 281, 283-84, 23 L.Ed. 707,

708 (1876).[2] This Court has long required rationality as a requirement of due process, striking down as violative of due process, that which is

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[2] Decisions from this Court, striking down irrational presumptions as violative of due process, are illustrative. E.g., a presumption violates due process and is

> "'**irrational**'" or 'arbitrary,' **and hence unconstitutional**, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." Leary v. United States, 395 U.S. 6, 36, 23 L.Ed.2d 57, 82 (1969). (Emphases added.)

> "the 'controlling' test for determining the validity of a statutory presumption was 'that there be a **rational connection** between the facts proved and the fact presumed.'" Id. at 33, 23 L.Ed.2d at 80. (Emphases added.)

See United States v. Ross, 92 U.S. (23 Wall.) 281, 283-84, 23 L.Ed. 707, 708 (1876); Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 55 L.Ed. 78 (1910).

irrational. E.g., Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560 (1979) (due process is violated if no **rational** factfinder could find proof beyond reasonable doubt as to every element of crime).[3] Accordingly, this Court has made rationality the benchmark of due process, meaning: that which is irrational violates due process.

So, too, the admission of evidence, recognized to be highly prejudicial, see

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[3] Cf., decisions upholding legislation against a due process challenge if there is a reasonable (i.e., rational) relationship between the law and a proper legislative purpose. See, e.g., Nebbia v. New York, 291 U.S. 502, 537, 78 L.Ed. 940, 957 (1934). Accord, decisions upholding a sentencing scheme as "rational": Chapman v. United States, 500 U.S. 453, 465, 114 L.Ed.2d 524, 538 (1991); United States v. Murphy, 899 F.2d 714, 717 (8 Cir. 1990). Again, irrationality = violation of due process.

Michelson v. United States, 335 U.S. 469, 475-76, 93 L.Ed. 168, 173-74 (1948),[4] that is irrelevant to any issue at trial, must violate due process.

State Evidentiary Rulings Can Violate Due Process. A ruling which is superficially a State evidentiary ruling, can rise to the level of a federal due process violation, if the ruling deprives the defendant of a fair trial. Osborne v. Wainwright, 720 F.2d

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[4] There, quoting from 1 WIGMORE, EVIDENCE § 57, at 456 (3d ed. 1940), this Court recognized:

> "'The deep tendency of human nature to punish, not because . . . [the defendant] is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury.'"

1237 (11 Cir. 1983)[5]; United States ex rel. Bibbs v. Twomey, 506 F.2d 1220, 1223 (7 Cir. 1974); see also Williams v. Kemp, 846 F.2d 1276 (11 Cir. 1988); Futch v. Dugger, 874 F.2d 1483 (11 Cir. 1989).

The Error Here Was Prejudicial and Deprived Defendant of a Constitutionally Fair Trial. Because the evidence of the nature of defendant's prior felony, admitted before the jury, was both irrelevant (by virtue of the stipulation) and highly prejudicial, and the evidence against defendant was far

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[5] "[W]hen faced with a claim of fundamental unfairness as a federal constitutional issue . . . , it is necessary . . . to consider and determine the issue presented as a federal constitutional issue and not a state evidentiary issue." Id. at 1238-39.

from overwhelming, defendant was deprived of a fair trial in violation of 14th Amendment due process of law in this case.

It is undisputed that defendant's fiancee shot herself, and that she had that gun in her possession earlier in the day. (Tr. F-101-103) The sole evidence that defendant ever possessed the gun - an essential element of the offense of which he stands convicted - is through his own alleged admissions (Tr. F-35-36; F-48; F-567-68), which are vague and unspecific as to <u>when</u> the defendant may have had contact with the gun. Moreover, some of the jurors had cause to pause; during deliberations, they requested the court's advice <u>re</u> evidentiary matters. (Tr. F-174-75)

Additionally, because the State courts did not believe there was a constitutional error, they would have failed to apply the rule applicable to such errors, as distinct from other errors, and would not have determined whether the State could prove any error harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705 (1967).

* * *

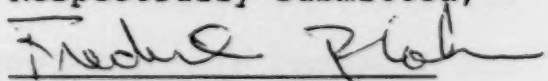
Since here, there was a total absence of relevancy, unnecessarily presenting to the jury, evidence that defendant's prior felony was for a weapons conviction, violated due process at his trial for possession of firearm by felon and deprived him of a constitutionally fair trial as required by due process.

This Court should grant certiorari to clarify that admission of irrelevant evidence of a highly prejudicial nature violates due process, and that Old Chief rests on a constitutional, due process footing and must therefore be followed in prosecution of State offenses, where an element of the offense is **any** prior felony conviction. The issue here, which often arises in prosecutions throughout the States, ought to be resolved by this Court.

C O N C L U S I O N

For any and/or all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



FREDERICK F. COHN
Attorney for Petitioner

APPENDICES

THIRD DIVISION
July 30, 1997

NOTICE

The text of the order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-96-1182

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 94 C6 60685
KEVIN IRBY, Defendant-Appellant.	)	Honorable Reginald Baker, Judge Presiding.

O R D E R

Defendant Kevin Irby was charged with unlawful use of a firearm by a felon and illegal delivery of a controlled substance. He filed several

motions to suppress evidence and statements. Following evidentiary hearings, the trial court denied defendant's motion to suppress a .380 caliber handgun and statements he made in his kitchen. After a jury trial, defendant was convicted of unlawful use of a weapon by a felon and sentenced to two years in prison. On appeal, defendant contends that evidence *[sic.]* his prior conviction for unlawful use of a weapon was improperly admitted before the jury, the .380 caliber semi-automatic handgun was seized in violation of his constitutional rights, and the trial court improperly denied his motion to suppress statements he made in his kitchen. *[p. 2]*

According to the testimony at the

evidentiary hearings, during an early morning argument on May 29, 1994, defendant's fiancee struck him in the head with a bottle at their Markham residence. While defendant was in the bathroom attending to his injury, his fiancee went into the bedroom and shot herself in the head. Defendant called police and paramedics. He was distraught and bleeding from the head when the officers arrived, but led them into the bedroom where the victim lay on the floor near a .380 caliber Braco Arms semi-automatic handgun. One of the officers unloaded the weapon and replaced it to preserve the crime scene for evidence technicians. When paramedics arrived, the officers took defendant into the kitchen so that the

paramedics could care for the victim. Upon questioning, defendant told the officers about the quarrel and that while he was attending to his head wound in the bathroom, he heard a gunshot and found the victim in the bedroom. Defendant also told the officers that a friend had given him the weapon in payment for a debt. After paramedics removed the victim from the house, defendant was taken to the police station where he made a statement. The evidence technicians arrived shortly thereafter and inventoried the handgun and other evidence. The trial court denied defendant's motion to suppress his statement made to the officers and the admission of the handgun into evidence. At trial, the parties

stipulated to the chain of custody as to the *[p. 3]* handgun and a certified copy of defendant's prior conviction for unlawful use of a weapon was introduced into evidence.

Defendant first asserts that the trial court abused its discretion when it refused to grant his motion in limine to exclude evidence regarding the nature of his prior conviction underlying the unlawful use of a firearm by a felon charge. Section 24-1.1 of the Criminal Code of 1961 makes it a felony for a person to knowingly possess any firearm if the person has been convicted of a felony under the laws of this State or of any other jurisdiction. 720 ILCS 5/24-1.1(a) (West 1994). In a case where the charge against a defendant is

the felony offense of unlawful use of a weapon by a felon, evidence of a defendant's alleged prior conviction must be presented by the State in its case in chief because the prior conviction is proof of an element of the offense itself. People v. Smith, 148 Ill. 2d 454, 464-465, 593 N.E.2d 533 (1992); People v. Pendleton, 185 Ill. App. 3d 768, 775, 542 N.E.2d 386 (1989).

We note that defendant concedes that he has no authority to support his contention, but asks that this court depart from well settled law. We decline. The State was required to plead and prove defendant's prior felony. Illinois courts have not barred the State from presenting evidence on the nature of the underlying felony

supporting a charge of unlawful use of a weapon by a felon even where there is a stipulation to that felony. *[p. 4]* Thus we find no abuse of trial court discretion. People v. Clark, 186 Ill. App. 3d 109, 114, 542 N.E.2d 158 (1989). Defendant also argues that he was prejudiced when the prosecutor commented about the nature of his prior offense during closing argument. However, it is permissible for the prosecutor to comment on the evidence and draw reasonable inferences from it during closing argument. People v. McGee, 165 Ill. App 3d. *[sic.]* 833, 836, 520 N.E.2d 840 (1987). Defendant also claims that the jury should have been given a limiting instruction as to the use to which it could apply evidence regarding

the nature of his prior felony. A review of the record reveals, however, that defendant strongly objected to such an instruction during the instruction conference. Defendant then argued that the instruction unduly highlighted his prior conviction and jurors would improperly use it as evidence showing his propensity to commit the offense. The trial court sustained defendant's objection and did not give the instruction. Under the circumstances, defendant's claim is without merit.

Defendant also asserts that the .380 caliber semi-automatic handgun was seized in violation of his constitutional rights. Where there is no challenge to the facts or the credibility of the witnesses, we review

a motion to suppress de novo. People v. Pierini, 278 Ill. App. 3d 974, 977, 664 N.E.2d 140 (1996). On a motion to suppress evidence, defendant has the burden of proving *[p. 5]* that the search and seizure were unreasonable. People v. Mason, 268 Ill. App. 3d 249, 254, 644 N.E.2d 13 (1994). The plain view doctrine allows a police officer to seize an item when (1) the officer is lawfully located in the place where he observed the object; (2) the object is in plain view; and (3) the item's incriminating nature is "immediately apparent." People v. Madison, 264 Ill. App. 3d 481, 486, 637 N.E. 2d 1074 (1994). A warrantless seizure of evidence is permissible under the plain view doctrine because it does not

constitute an intrusive invasion. People v. Edwards, 144 Ill. 2d 108, 134, 579 N.E.2d 336 (1991).

In the instant case, the officers came to defendant's house in response to his call for assistance after his fiancee shot herself in the head. Defendant then led the officers into the bedroom where the victim lay on the floor near the .380 caliber semi-automatic handgun. One of the officers unloaded the weapon but replaced it to preserve the crime scene for evidence technicians. When the technicians arrived, they inventoried the gun along with other evidence. We believe that it was reasonable for the officer to have unloaded the weapon and replaced it to preserve the crime scene for the

evidence technicians. The technicians inventoried the handgun along with other evidence when the processed the crime scene. The seizure of the weapon by the evidence technicians was a continuation and part of the *[p. 6]* initial seizure of the weapon by officers who first arrived at the residence in response to defendant's call for help. They simply left the weapon there to preserve the crime scene for processing by the evidence technicians. Despite defendant's claims to the contrary, the police did not conduct two separate searches and seizures. The officers were lawfully at the house, the weapon was in plain view and it was immediately apparent that it was evidence. People v. Manikowski, 186 Ill. App. 3d 1007,

1011-1112 *[sic.]*, 592 N.E.2d 1148 (1989).

Defendant also contends that the trial court erroneously denied his motion to suppress the statement he made to the police officers in his kitchen when he was not advised of his Miranda rights. Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), requires law enforcement officers to advise a suspect of his constitutional rights when he is in custody and is being interrogated. Custodial interrogation may be found when officers initiate questioning after a person is taken into custody or otherwise deprived of his freedom in any significant way. Miranda v Arizona, 384 U.S. at 444; People v. Canet, 218 Ill.

App. 3d 855, 865, 578 N.E.2d 1146 (1991). Furthermore, while Miranda warnings are required for custodial interrogation, police need not give the warnings before asking questions in the course of general on-the-scene investigation of a possible crime. *[p. 7]* People v. Laspisa, 243 Ill. App. 3d 777, 783, 612 N.E.2d 994 (1993).

Here, shortly after defendant led the officers to his fiancee in the bedroom the paramedics arrived. The officers took defendant into the kitchen and questioned him to determine how the shooting occurred. Defendant then made a statement about the incident and also disclosed that the handgun was his. The officers were not required to advise defendant of his Miranda rights because

he was not in custody. The officers were merely conducting as general on-the-scene inquiry to gather information regarding the shooting. Therefore, the trial court did not err in denying defendant's motion to suppress.

Accordingly, the judgment of the circuit court of Cook County is affirmed. As part of our judgment, we grant the State's request and assess defendant $100 as costs for this appeal.

Affirmed.

GORDON, J., with COUSINS, Jr., P.J. and LEAVITT, J., concurring.

THIRD DIVISION
September 17, 1997

NOTICE

The text of the order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-96-1182

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 94 C6 60685
KEVIN IRBY, Defendant-Appellant.	)	Honorable Reginald Baker, Judge Presiding.

MODIFIED UPON PETITION FOR REHEARING

Defendant Kevin Irby was charged with unlawful use of a firearm by a felon and illegal delivery of a controlled substance. He filed several

motions to suppress evidence and statements. Following evidentiary hearings, the trial court denied defendant's motion to suppress a .380 caliber handgun and statements he made in his kitchen. After a jury trial, defendant was convicted of unlawful use of a weapon by a felon and sentenced to two years in prison. On appeal, defendant contends that evidence *[sic.]* his prior conviction for unlawful use of a weapon was improperly admitted before the jury, the .380 caliber semi-automatic handgun was seized in violation of his constitutional *[p. 2]* rights, and the trial court improperly denied his motion to suppress statements he made in his kitchen.

According to the testimony at the

evidentiary hearings, during an early morning argument on May 29, 1994, defendant's fiancee struck him in the head with a bottle at their Markham residence. While defendant was in the bathroom attending to his injury, his fiancee went into the bedroom and shot herself in the head. Defendant called police and paramedics. He was distraught and bleeding from the head when the officers arrived, but led them into the bedroom where the victim lay on the floor near a .380 caliber Braco Arms semi-automatic handgun. One of the officers unloaded the weapon and replaced it to preserve the crime scene for evidence technicians. When paramedics arrived, the officers took defendant into the kitchen so that the

paramedics could care for the victim. Upon questioning, defendant told the officers about the quarrel and that while he was attending to his head wound in the bathroom, he heard a gunshot and found the victim in the bedroom. Defendant also told the officers that a friend had given him the weapon in payment for a debt. After paramedics removed the victim from the house, defendant was taken to the police station where he made a statement. The evidence technicians arrived shortly thereafter and inventoried the handgun and other evidence. The trial court denied defendant's motion to suppress his statement made to the officers and the admission of the handgun into evidence. At *[p. 3]* trial, the parties

stipulated to the chain of custody as to the handgun and a certified copy of defendant's prior conviction for unlawful use of a weapon was introduced into evidence.

Defendant first asserts that the trial court abused its discretion when it refused to grant his motion in limine to exclude evidence regarding the nature of his prior conviction underlying the unlawful use of a firearm by a felon charge. Section 24-1.1 of the Criminal Code of 1961 makes it a felony for a person to knowingly possess any firearm if the person has been convicted of a felony under the laws of this State or of any other jurisdiction. 720 ILCS 5/24-1.1(a) (West 1994). In a case where the charge against a defendant is

the felony offense of unlawful use of a weapon by a felon, evidence of a defendant's alleged prior conviction must be presented by the State in its case in chief because the prior conviction is proof of an element of the offense itself. People v. Smith, 148 Ill. 2d 454, 464-465, 593 N.E.2d 533 (1992); People v. Pendleton, 185 Ill. App. 3d 768, 775, 542 N.E.2d 386 (1989).

We note that defendant concedes that he has no authority to support his contention, but asks that this court depart from well settled law. We decline. The State was required to plead and prove defendant's prior felony. Illinois courts have not barred the State from presenting evidence on the nature of the underlying felony

supporting a charge of unlawful use of a weapon *[p. 4]* by a felon even where there is a stipulation to that felony. Thus we find no abuse of trial court discretion. People v. Clark, 186 Ill. App. 3d 109, 114, 542 N.E.2d 158 (1989).

Defendant asks this court to follow Old Chief v. United States, 519 U.S. ___, 136 L. Ed. 2d 574, 117 S. Ct. 644 (1997), and find that when the State introduced evidence of this prior conviction for unlawful use of a weapon instead of accepting his offer to stipulate that he had a prior felony conviction he was unnecessarily prejudiced. More specifically, defendant argues that evidence of the specific nature of his prior felony conviction was unnecessary under the

circumstances.

In Old Chief the defendant was charged with unlawful possession of a firearm by a felon. 18 USCS 922(g)(1). Defendant offered to stipulate that he had a prior felony conviction, which was an element in the offense. He maintained that he would be unduly prejudiced by the introduction of the name and nature of the prior conviction (assault causing bodily injury). The government refused and presented its own evidence. Following jury trial, the defendant was convicted as charged. In reversing that judgment the U.S. Supreme Court held that a district court abuses its discretion when it rejects an offer to stipulate to a prior felony conviction and instead allows the name

and nature of the prior offense. The Court reasoned that such evidence raises the risk of a verdict tainted by improper factors when the sole *[p. 5]* purpose of the evidence is to prove a prior conviction. It held that under Rule 403 of the Federal Rules of Evidence (28 U.S.C. 403) which allows a trial judge to exclude relevant evidence when its probative value is substantially outweighed by the danger of substantially unfair prejudice, the prior felony conviction was not admissible. 117 S. Ct. at 655-66.

Old Chief is not controlling here because it involves the construction of a federal statute and does not purport to be a ruling of constitutional dimension. The Federal Rules of

Evidence do not apply to Illinois criminal proceedings even though the Illinois Supreme Court may look to the Federal Rules for guidance. (See e.g. People v. Montgomery, 47 Ill. 2d 510, 519 (1971) when the court held that the provisions of Federal Rule 609 should be followed in determining the admissibility of prior convictions to impeach credibility.)

Further and more overridingly, unlike Old Chief, defendant herein, was not prejudiced by the admission of evidence regarding his prior unlawful use of a firearm conviction. The evidence against defendant on the unlawful use of a weapon charge by a felon was overwhelming. Defendant admitted police officers into his home

in Harvey, Illinois after his fiancee shot herself in the head. Defendant then told the officers that a friend had given him the weapon to settle a debt. Furthermore, defense counsel rejected a limiting instruction to the jurors concerning *[p. 6]* the introduction of evidence regarding the prior conviction to minimize attention to that evidence.

Defendant also argues that it was error for the prosecutor to comment about the nature of his prior offense during closing argument. However, it is permissible for the prosecutor to comment on the evidence and draw reasonable inferences from it during closing argument. People v. McGee, 165 Ill. App 3d. *[sic.]* 833, 836, 520 N.E.2d 840 (1987). Defendant also claims that

the jury should have been given a limiting instruction as to the use to which it could apply evidence regarding the nature of his prior felony. A review of the record reveals, however, that defendant strongly objected to such an instruction during the instruction conference. Defendant then argued that the instruction unduly highlighted his prior conviction and jurors would improperly use it as evidence showing his propensity to commit the offense. The trial court sustained defendant's objection and did not give the instruction. Under the circumstances, defendant's claim is without merit.

Defendant also asserts that the .380 caliber semi-automatic handgun was seized in violation of his

constitutional rights. Where there is no challenge to the facts or the credibility of the witnesses, we review a motion to suppress de novo. People v. Pierini, 278 Ill. App. 3d 974, 977, 664 N.E.2d 140 (1996). On a motion to suppress evidence, defendant has the burden of proving *[p. 7]* that the search and seizure were unreasonable. People v. Mason, 268 Ill. App. 3d 249, 254, 644 N.E.2d 13 (1994). The plain view doctrine allows a police officer to seize an item when (1) the officer is lawfully located in the place where he observed the object; (2) the object is in plain view; and (3) the item's incriminating nature is "immediately apparent." People v. Madison, 264 Ill. App. 3d 481, 486, 637 N.E. 2d 1074

(1994). A warrantless seizure of evidence is permissible under the plain view doctrine because it does not constitute an intrusive invasion. People v. Edwards, 144 Ill. 2d 108, 134, 579 N.E.2d 336 (1991).

In the instant case, the officers came to defendant's house in response to his call for assistance after his fiancee shot herself in the head. Defendant then led the officers into the bedroom where the victim lay on the floor near the .380 caliber semi-automatic handgun. One of the officers unloaded the weapon but replaced it to preserve the crime scene for evidence technicians. When the technicians arrived, they inventoried the gun along with other evidence. We believe that it

was reasonable for the officer to have unloaded the weapon and replaced it to preserve the crime scene for the evidence technicians. The technicians inventoried the handgun along with other evidence when the processed the crime scene. The seizure of the weapon by the evidence technicians was a continuation and part of the *[p. 8]* initial seizure of the weapon by officers who first arrived at the residence in response to defendant's call for help. They simply left the weapon there to preserve the crime scene for processing by the evidence technicians. Despite defendant's claims to the contrary, the police did not conduct two separate searches and seizures. The officers were lawfully at the house, the weapon

was in plain view and it was immediately apparent that it was evidence. People v. Manikowski, 186 Ill. App. 3d 1007, 1011-1112 *[sic.]*, 592 N.E.2d 1148 (1989).

Defendant also contends that the trial court erroneously denied his motion to suppress the statement he made to the police officers in his kitchen when he was not advised of his Miranda rights. Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966), requires law enforcement officers to advise a suspect of his constitutional rights when he is in custody and is being interrogated. Custodial interrogation may be found when officers initiate questioning after a person is taken into custody or

otherwise deprived of his freedom in any significant way. Miranda v Arizona, 384 U.S. at 444; People v. Canet, 218 Ill. App. 3d 855, 865, 578 N.E.2d 1146 (1991). Furthermore, while Miranda warnings are required for custodial interrogation, police need not give the warnings before asking questions in the course of general on-the-scene investigation of a possible crime. *[p. 9]* People v. Laspisa, 243 Ill. App. 3d 777, 783, 612 N.E.2d 994 (1993).

Here, shortly after defendant led the officers to his fiancee in the bedroom the paramedics arrived. The officers took defendant into the kitchen and questioned him to determine how the shooting occurred. Defendant then made a statement about the incident and also

disclosed that the handgun was his. The officers were not required to advise defendant of his Miranda rights because he was not in custody. The officers were merely conducting as general on-the-scene inquiry to gather information regarding the shooting. Therefore, the trial court did not err in denying defendant's motion to suppress.

Accordingly, the judgment of the circuit court of Cook County is affirmed. As part of our judgment, we grant the State's request and assess defendant $100 as costs for this appeal.

Affirmed.

GORDON, J., with COUSINS, Jr., P.J. and LEAVITT, J., concurring.

Appendix C - App. 33

SUPREME COURT BUILDING
84302 SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

February 4, 1998

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No. 84302 - People State of Illinois, respondent, v. Kevin Irby, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 26, 1998.